



Notre Dame Law Review Online

Volume 91 | Issue 3

Article 3

4-2016

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Recommended Citation

Michael C. Mikulic, Case Comment, *The Emergence of Contextually Constrained Purposivism*, 91 Notre Dame L. Rev. Online 128 ().
Available at: http://scholarship.law.nd.edu/ndlr_online/vol91/iss3/3

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CASE COMMENT

THE EMERGENCE OF CONTEXTUALLY CONSTRAINED PURPOSIVISM

*Michael C. Mikulic**

INTRODUCTION

Chief Justice John Marshall once famously wrote, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”¹ Chief Justice Marshall was describing the Supreme Court’s most basic role: determining the meaning of legal provisions. Yet, despite how doctrinal these lines are, the Court has never established a uniform method of interpretation.² After years of the Court’s drift towards new textualism, *King v. Burwell*³ reaffirms that purposivism still has relevancy; contextually constrained purposivism is the new trend.

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1 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). In his now famous book, *A Matter of Interpretation*, Justice Antonin Scalia quotes Joel Bishop, a renowned nineteenth century legal writer, who echoed Chief Justice Marshall’s words: “[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997) (alteration in original) (emphasis omitted) (quoting JOEL PRENTISS BISHOP, *COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION* § 70 (Boston, Little, Brown & Co. 1882)).

2 See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”); see also SCALIA, *supra* note 1, at 14 (“Surely this is a sad commentary: We American judges have no intelligible theory of what we do most.”). For purposes of this Case Comment, only the judiciary’s interpretation of *statutes* will be analyzed.

3 135 S. Ct. 2480 (2015).

One of the central debates in statutory interpretation is whether judges should follow the spirit of the law or its letter.⁴ Though these two approaches differ significantly, each ultimately focuses on ascertaining the congressional intent expressed in a statute.⁵ At one end of the spectrum, to follow the spirit of the law means to try and interpret individual statutory provisions in light of the provision's larger purpose.⁶ On this view, judges care more about *why* the law was passed, rather than how the law is communicated through the text. To find the statute's spirit, judges look to a wide variety of factors, including language, structure, history surrounding the enactment of the law, the evil Congress sought to combat by passing the law, and legislative history. At the other end of the spectrum, to follow the letter means to look only to the *stated text*. Congress's purpose—the law Congress intended to make—is there in the words. To such textualists, the plain meaning rule is sacrosanct.⁷ If the provision remains vague or ambiguous, textualist judges look to more text, or the wider provisions surrounding the ambiguous one at hand. These judges rarely take into account extra-textual considerations.

In *King*, the Court grappled with this ideological debate and decided that, when the spirit and letter of the law directly conflict, the spirit trumps. The Court employed an almost purely purposivist approach to interpreting

4 See *Eyston v. Studd* (1573) 75 Eng. Rep. 688, 695, 2 Plowd. 459, 465 (K.B.) (“Law . . . consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law . . .”); see also JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 27–29 (2d ed. 2013) (offering an excellent overview of the debate).

5 This Case Comment argues that most judges see their roles as agents of Congress, tasked with trying to implement the decisions made by Congress. For more on this agency theory, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (“In a democratic system, with an electorally accountable legislature and separated powers, it is said to be the appropriate and indeed constitutionally prescribed role of the courts to apply legislative commands . . .”). Thus, this agency theory of the Court's role is said to be most in line with democratic principles of governance. See Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 249 (Mark DeWolfe Howe ed., 1953) (“[I]f my fellow citizens want to go to Hell I will help them. It's my job.”).

6 See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 174 (1921) (“We may figure the task of the judge, if we please, as the task of a translator, the reading of signs and symbols given from without. None the less, we will not set men to such a task, *unless they have absorbed the spirit*, and have filled themselves with a love, of the language they must read.” (emphasis added)).

7 To see the Court's affinity for applying the plain meaning rule at the end of the twentieth century, see Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 238.

the Patient Protection and Affordable Care Act (ACA).⁸ Instead of looking only to the plain language of the disputed provision, the Court readily took into account both the provision's context—the whole text and structure of the ACA—and the statute's implicit purpose. By doing so, the Court discounted the plain meaning of the specific provision in favor of the statute's overall purpose.

Regardless of whether the Court interpreted the provision correctly, *King* signals a change in the Court's methodology of statutory interpretation.⁹ This change harkens back to a classical period of interpretation where purposivism was the main statutory interpretation approach. However, the Court in *King* did not fully embrace classical purposivism. Instead, it insisted that text still plays an important role, to such a degree that the Court essentially employed a hybrid approach: contextually constrained purposivism.¹⁰ In other words, *King* suggests the Court has ushered in a new way to read statutes, primarily considering the purpose of the statute to find the provision's right meaning,¹¹ and then taking into account the statute's text.

This Case Comment will proceed by first outlining the various methods of statutory construction used by the Court throughout its history, leading up to the Court's implementation of contextually constrained purposivism in *King*. It will then provide a summary of the facts and procedural history of *King*, thereby setting the stage to explain how the Court invoked contextually constrained purposivism. Finally, the Case Comment will discuss some of the positive and negative implications of the approach.

8 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 5, 18, 21, 25–26, 29–31, 35 & 42 U.S.C.).

9 The Court's new technique in *King* was not a revolution in statutory interpretation. Indeed, the Court has long looked to both the text and purpose of a statute to determine a provision's meaning. As Chief Justice Roger Taney remarked over 150 years ago, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850). More accurately, the Court's technique in *King* is an *evolution* in statutory interpretation. The Court utilizes purpose and text in a new way to find a provision's meaning. As this Case Comment contends, the Court primarily looked to purpose, and then to text, to determine meaning.

10 Contextually constrained purposivism—a hybrid term proposed by this Case Comment—is explained in greater detail in Section I.B. To be fair, another commentator, Professor Richard M. Re, calls this method "The New Holy Trinity"—named after a case of the same name that took into account the spirit of the law over the letter. *See* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407–08 (2015).

11 By "right meaning," this Case Comment means Congress's originally intended meaning.

I. CONTEXTUALLY CONSTRAINED PURPOSIVISM IN *KING*

Throughout our nation's history, the Supreme Court has engaged in roughly four different methods of statutory interpretation: (1) old textualism, (2) purposivism, (3) new textualism, and (4) textually constrained purposivism. The Court has engaged in all four methods (and variations of each method) at different junctions, and no approach is strictly constrained to a certain era. However, there has been a general progression among these four approaches.

Old textualism was used by the Court in the late nineteenth and early twentieth century when, according to Professor Cass Sunstein, "[t]he most important organizing principle for interpretation was that regulatory statutes should be construed narrowly—so as to harmonize as much as possible with principles of private markets and private rights."¹² Although the shift from old textualism towards purposivism was likely influenced by the New Deal and the growth of the administrative state,¹³ the primary case exemplifying purposivism is *Holy Trinity Church v. United States*¹⁴—which was decided in 1892. In *Holy Trinity*, the Court stated, "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."¹⁵ The purposivism exhibited in *Holy Trinity* is the classic interpretive approach¹⁶ and was the dominant approach of the Court throughout most of the twentieth century.¹⁷

12 Sunstein, *supra* note 5, at 408. Professor Sunstein argues that the Court struck down regulatory statutes because it viewed them as "foreign substances"—new pieces of law. *Id.* (citing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 9 (1928) ("The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny.")). As examples of old textualism, Sunstein cites *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879), and *Johnson v. Southern Pacific Co.*, 117 F. 462, 466 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904). Sunstein, *supra* 5, at 408 n.5. For a modern example, see *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502–03 (2012).

13 Starting in the 1930s and continuing in later cases, the Court abandoned favoring laissez-faire jurisprudence. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934). As a result, no longer did the Court attempt to construe statutes narrowly in order to advance its favorite economic theory. Professor Sunstein generally explains why. See Sunstein, *supra* note 5, at 409 ("The demands of the modern administrative state ultimately made it impossible for courts to sustain a theory of interpretation rooted in nineteenth-century common law.").

14 143 U.S. 457 (1892).

15 *Id.* at 459.

16 See MANNING & STEPHENSON, *supra* note 4, at 29, 36–44.

17 See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113.

Believing that purposivism invites too much discretion for judges to read their own morals and values into statutes,¹⁸ the new textualist movement brings back the primacy of the letter of the law.¹⁹ New textualists, like the late Justice Antonin Scalia²⁰ and Judge Frank Easterbrook,²¹ start with the premise that this nation is a government of laws, not men.²² This means judges do not need to consult external sources to find out what Congress intended to agree upon—because Congress’s agreement is expressed *in the text* of the statute.²³ The fourth method, textually constrained purposivism,²⁴ emerged in response to the absurd results sometimes produced by new textualism. Under the approach of textually constrained purposivism, the Court first looks to the text of the provision for meaning.²⁵ If the text is unambiguous, there is no need for further analysis: the plain meaning of the text governs. As the Court explained, “Our first step in interpreting a statute is to determine whether

18 See SCALIA, *supra* note 1, at 17–18 (“The *practical* threat [of purposivism] is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”).

19 See MANNING & STEPHENSON, *supra* note 4, at 44–60.

20 See Amy Gutmann, *Introduction* to SCALIA, *supra* note 1, at vii.

21 See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 60 (1988) (“The words of the statute, and not the intent of the drafters, are the ‘law.’”).

22 See SCALIA, *supra* note 1, at 17 (“Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.”).

23 Unlike purposivists, new textualists outright dismiss the use of legislative history. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–56 (1990). Moreover, new textualists believe that it is almost impossible for judges to discern the one true purpose of why a statute was passed. Since each of the 535 members of Congress might have a different reason for approving of (or rejecting) a statute, the best way to discern Congress’s collective purpose is to look at the statute’s text, which is the only evidence of Congress’s objectified intent.

24 For more on textually constrained purposivism, see MANNING & STEPHENSON, *supra* note 4, at 60–72; Manning, *supra* note 17. Professor Manning calls textually constrained purposivism by different names, including “textually-structured purposivism,” “purpose-sensitive textualis[m],” and “new purposivism.” *Id.* at 116, 119, 147; see also Cory R. Liu, Note, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J.L. & PUB. POL’Y 711, 721 (2015) (“By giving primacy to the text and using evidence of purpose only to resolve ambiguities, modern textually-constrained purposivists can also be characterized as discerning how a reasonable reader would understand the text of the statute.”).

25 See *Re*, *supra* note 10, at 408 n.4 (“The New Purposivism [i.e., textually constrained purposivism] resembles the New Textualism in that it honors clear text, viewing it as a ‘trump’ . . .”).

the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’”²⁶ Indeed, in many cases, the Court begins and ends with a reading of the plain text.²⁷ But, in the hardest cases, the language is not conclusive. Still, it is only when the text is ambiguous that judges look to other considerations. As Judge Easterbrook explained, “Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity.”²⁸ Thus, under textually constrained purposivism, judges must first establish ambiguity, and only then consider other sources.

Amid this backdrop of varied interpretation techniques, the Court in *King* introduced *contextually* constrained purposivism. In this approach, the statute’s overall purpose is the chief tool a judge uses to understand a supposedly disputed provision in the statute—even a plainly worded provision. Judges under this approach begin with the text of the provision at hand, but will still look to the context, or surrounding provisions and structure of the statute, as well as extra-textual considerations, to determine that disputed provision’s meaning. In this way, the approach differs from textually constrained purposivism in that even a plainly worded provision can be read in a different way. Section A of this Part provides an in-depth look at *King*: detailing the case’s factual background, explaining the procedural history, and clarifying the central issue. It also describes the history of health care reform and the reasons why Congress passed the ACA. Section B then analyzes Chief Justice John Roberts’s majority opinion and argues that the Court employed a new approach to statutory interpretation: contextually constrained purposivism. The Court primarily used purpose to find ambiguity in what was plain text, and then utilized purpose again to resolve the ambiguity. All the while, it looked to the context surrounding the challenged statutory provision to find ambiguity and ascertain the larger purpose of the statute.

26 *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). The Court has time and again explained this cardinal rule of interpretation: “We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

27 See YULE KIM, CONG. RESEARCH SERV., RL97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008).

28 *Nat’l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (first citing *Sundstrand Corp. v. Comm’r*, 17 F.3d 965, 967 (7th Cir. 1994); then citing *Calderon v. Witvoet*, 999 F.2d 1101, 1104 (7th Cir. 1993); then citing *Lincoln v. Virgil*, 508 U.S. 182, 191 (1993); and then citing *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988)).

A. Summary of the Facts and Procedural History

Before the ACA, many people were unable to afford health insurance.²⁹ Congress passed the ACA to combat two problems: first, a potential “economic ‘death spiral’”³⁰ of rising health care insurance costs and, second, to expand access to health care insurance for as many people as possible.³¹ One of the main causes of this death spiral was the phenomenon of “adverse selection.”³² In general, health insurance involves pooling risk, or transferring costs from high-cost insureds (who are the most sick) to low-cost insureds (who are the least sick) through the medium of the insurance company.³³ In adverse selection, sick people are more likely than healthy ones to purchase health insurance, driving insurance costs upwards for all insureds in the pool.³⁴ For some, the cost of insurance becomes too high to afford.

The ACA seeks to lower the cost of individual health insurance and combat adverse selection through a system of three interwoven mandates.³⁵ First, the Act bars insurers from taking a person’s health into account when deciding to sell health insurance or how much to charge for that insurance.³⁶ The second is that the Act requires persons to have health insurance coverage, or risk making a payment to the Internal Revenue Service (IRS).³⁷ The third is that the Act affords premium tax credits

29 According to political analyst Yuval Levin, there were approximately fifty million people uninsured when Congress passed the ACA. Yuval Levin, *Help the Sick and Reduce the Debt: The Moral Economy of the Health-Care Debate*, WITHERSPOON INST. (Aug. 30, 2011), <http://www.thepublicdiscourse.com/2011/08/3824/>.

30 *King v. Burwell*, 135 S. Ct. 2480, 2486 (2015).

31 *See id.* at 2485.

32 BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 637 (7th ed. 2013). Another main cause of the economic death spiral was a phenomenon called “moral hazard,” which is the tendency of injured persons to excessively use services for which they are insured. *Id.* at 638. Consumers are not cost-sensitive when they do not have to foot the bill for these services. *Id.*

33 *See id.* at 633.

34 *See id.* at 637.

35 *See id.* at 540–44; *see also King*, 135 S. Ct. at 2486–87 (summarizing three elements of ACA).

36 These are called the “guarantee issue” and “community rating” requirements. *King*, 135 S. Ct. at 2485. The guaranteed issue requirement bars insurers from denying coverage to any person because of his or her health, and the community rating requirement bars insurers from charging a person higher premiums for the same reason. *Id.*

37 *See id.* at 2486. This is called the “individual mandate” requirement. *Id.* at 2502 (Scalia, J., dissenting). Congress sought this requirement to encourage more people to sign up for health insurance in order to pool risk and make it less costly to pay for high cost insureds. *See id.* at 2486 (majority opinion). That is why the individual mandate debate in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2585 (2012), was so important, for the mandate was one way to combat adverse selection. As the Court in

(subsidies) to certain individuals to make health insurance more affordable.³⁸ This third mandate is the ACA's primary strategy for expanding access.³⁹ The Act contemplates that the States or the Federal Government can establish Exchanges,⁴⁰ or marketplaces where people can purchase health insurance.

The main issue in *King* laid in the realm of these Exchanges. The ACA, codified in Section 36B of the Tax Code, mandates that only individuals enrolled in an insurance plan in an Exchange "established by a State" are entitled to premium tax credits.⁴¹ The Act defines "State" as "each of the 50 States and the District of Columbia."⁴² Thus, the issue of statutory interpretation before the Court concerned whether these tax credits, which are available in State Exchanges, are also available in Federal Exchanges. The implications of the Court's interpretation were of "deep 'economic and political significance.'"⁴³ By the time the case reached the Court, sixteen States and the District of Columbia had established their own Exchanges, whereas the Government had established Exchanges in thirty-four.⁴⁴ Under a narrow reading of Section 36B, millions stood to lose their insurance plans should the Court decide that individuals who had purchased their health insurance through Federal Exchanges could not receive tax credits.⁴⁵

King explained, "Congress adopted a coverage requirement to 'minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.'" *King*, 135 S. Ct. at 2486 (quoting 42 U.S.C. § 18091(2)(I) (2012)).

38 Americans earning up to 400 percent of the federal poverty level (calculated to be \$46,680 for an individual and \$95,400 for a family of four) are eligible for a tax credit. See 26 U.S.C. § 36B(c)(1)(A) (2012); *Eligibility for the Premium Tax Credit*, IRS, <https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Eligibility-for-the-Premium-Tax-Credit> (last updated Jan. 12, 2016).

39 See FURROW ET AL., *supra* note 32, at 540 ("The primary strategy of the ACA for expanding access to health insurance for middle-income Americans is the use of the means-tested tax credits to subsidize the purchase of private health insurance.").

40 The ACA states that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1).

41 26 U.S.C. § 36B(b)(2)(A).

42 42 U.S.C. § 18024(d).

43 *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

44 *Id.* at 2487.

45 The Court in *King* wrote, "One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent." *Id.* at 2493 (citing EVAN SALTZMAN & CHRISTINA EIBNER, RAND CORP., THE EFFECT OF ELIMINATING THE AFFORDABLE CARE ACT'S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES 1 (2015), http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR980/RAND_RR980.pdf ("Enrollment in the ACA-compliant individual market . . . would decline by 9.6 million, or 70 percent, in federally facilitated marketplace (FFM) states.")). The Court then

The procedural history of the case is straightforward. Four Virginia residents, who did not want to purchase health insurance or make a payment to the IRS, brought an action challenging the ACA.⁴⁶ The petitioners argued that the Act only granted tax credits to individuals who purchased insurance from State Exchanges, not Federal ones.⁴⁷ The district court granted the Government's motion to dismiss.⁴⁸ The Court of Appeals for the Fourth Circuit affirmed.⁴⁹ On the same day in a different case, the Court of Appeals for the D.C. Circuit held that the Act restricted tax credits to State Exchanges only.⁵⁰ The Court granted the challengers' petition for a writ of certiorari in order to resolve the circuit split.

B. The Majority Opinion's Use of Contextually Constrained Purposivism

Writing for the majority,⁵¹ Chief Justice Roberts held that premium tax credits are available to both State and Federal Exchanges under Section 36B.⁵² His opinion proceeds in roughly two parts. First, he discusses the history of health care reform in the United States and why Congress implemented the ACA. Then, he engages in contextually constrained purposivism to understand the meaning of the challenged provision. Chief Justice Roberts reads ambiguity into what is a plainly written provision by looking to the purpose of the statute and the context surrounding the provision. To resolve the ambiguity, he again looks to purpose provided by the context of the statute's enactment.⁵³

cited another study that "predict[ed] that premiums would increase by 35 percent and enrollment would decrease by 69 percent." *Id.* at 2493–94 (citing LINDA J. BLUMBERG ET AL., URBAN INST., THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING V. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS 1 (2015), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2015/rwjf417289 ("We estimate that a victory for the plaintiff would increase the number of uninsured in 34 states by 8.2 million people . . .")).

46 *Id.* at 2487.

47 *See id.*

48 *Id.* at 2488.

49 *Id.*

50 *Id.*; *see* Halbig v. Burwell, 758 F.3d 390, 404–05 (D.C. Cir. 2014).

51 The case was decided by six votes to three, with Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan joining the majority opinion. Justice Antonin Scalia authored the dissent, joined by Justices Clarence Thomas and Samuel Alito. *King*, 135 S. Ct. at 2484.

52 *Id.* at 2496.

53 This is not the first time the Court engaged in contextually constrained purposivism. *See* Re, *supra* note 10, at 409–13, for a discussion of cases, including *Bond v. United States*, 134 S. Ct. 2077 (2014), and *Yates v. United States*, 135 S. Ct. 1074 (2015). However, the Court has not uniformly applied the approach. *See* *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), for a recent example where the Court chose to

Chief Justice Roberts begins the opinion by focusing on the history and purpose surrounding the ACA. The first line is telling: “The [ACA] adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market.”⁵⁴ The immediate focus on why Congress passed the ACA—to expand access to health insurance—supports the notion that this purpose is the most important consideration. He then spends three pages highlighting the history of health care reform, explaining how these reforms sought to combat an economic death spiral.⁵⁵ He also mentions how Massachusetts prevented the spiral by passing health care reform that significantly expanded coverage to all but 2.6% of the state’s residents.⁵⁶ It was a great success, no doubt one Congress tried to replicate by passing the ACA.⁵⁷

After discussing the history and purpose of the ACA,⁵⁸ Chief Justice Roberts commences his statutory analysis of Section 36B.⁵⁹ At first, he appears to apply a new textualist method by making it seem like text is of paramount concern: “We begin with the text of Section 36B.”⁶⁰ But later in the opinion, it is evident that purpose is his most important consideration. He analyzes the language of Section 36B in depth for over three pages to determine what an “Exchange established by the State” means.⁶¹ He readily admits, “If the statutory language is plain, we must enforce it according to its terms” and later, “Petitioners’ arguments about the plain meaning of Section 36B are strong.”⁶² Under the plain meaning, only individuals who purchased insurance from State Exchanges would receive tax credits. A new textualist or textually constrained purposivist would start and end with the letter of the provision.⁶³

take a textualist approach to understand a provision—even though the Legislature would have probably rejected the interpretation.

54 *King*, 135 S. Ct. at 2485.

55 *See id.* at 2485–87.

56 *Id.* at 2486.

57 *See id.* (“The [ACA] adopts a version of the three key reforms that made the Massachusetts system successful.”).

58 Chief Justice Roberts spends part of his opinion discussing whether the IRS had the authority to interpret the provision, but for purposes of this Case Comment, it will not be detailed. *See id.* at 2488–89.

59 *See id.* at 2489.

60 *Id.*

61 *See id.* at 2489–92.

62 *Id.* at 2489, 2495 (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)).

63 For an illustration of what a new textualist or textually constrained judge would do, see Justice Scalia’s concurrence in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) (arguing that the Constitution’s Recess Appointments Clause, whose meaning was in contention, should have been resolved based on its seemingly clear text, without regard to its purpose).

But Chief Justice Roberts is neither.⁶⁴ Instead, he looks to two sources to determine that the provision is ambiguous: context and, more importantly, purpose. Chief Justice Roberts first looks to the context.⁶⁵ He analyzes Section 36B by reading other provisions and the structure of the Act.⁶⁶ These other provisions contemplate there being qualified individuals who merit tax credits in every type of Exchange—including Federal. For example, Section 18041 dictates that if States choose not to establish an Exchange, the Government will establish “*such Exchange*.”⁶⁷ Using Black’s Law Dictionary, Chief Justice Roberts finds that this phrase means that if States do not establish Exchanges, the Government will step in to establish the same type of Exchange.⁶⁸ He then looks to two other provisions, one mandating that “all Exchanges ‘shall make available qualified health plans to qualified individuals,’”⁶⁹ and another mandating for “all Exchanges to create outreach programs that must ‘distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B.’”⁷⁰ Chief Justice Roberts concludes, “If tax credits were not available on Federal Exchanges, these provisions would make little sense.”⁷¹ They presuppose the availability of tax credits for Federal Exchanges.

64 In fact, Chief Justice Roberts never has been. In his confirmation hearings, he lays out his philosophy on statutory interpretation: “You begin with the text, and as the Supreme Court has said, in many cases, perhaps most cases, that’s also where you end. The answer is clear. I have, though, as a judge, relied on legislative history to help clarify ambiguity in the text.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 319 (2005) (statement of John G. Roberts, Jr.).

65 Chief Justice Roberts explains, “[M]eaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *King*, 135 S. Ct. at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

66 He writes, “[W]e ‘must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme [i.e., structure].’” *Id.* at 2492 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014)). For a discussion of the importance of utilizing structure in statutory interpretation, see generally Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1987).

67 42 U.S.C. § 18041(c)(1) (2012) (emphasis added).

68 *King*, 135 S. Ct. at 2489 (“By using the phrase ‘such Exchange,’ Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031.”) (citing *Such*, BLACK’S LAW DICTIONARY 1661 (10th ed. 2014) (defining “such” as “[t]hat or those; having just been mentioned”)).

69 *Id.* at 2490 (quoting 42 U.S.C. § 18031(d)(2)(A)).

70 *Id.* at 2491 (alteration in original) (quoting 42 U.S.C. § 18031(i)(3)(B)).

71 *Id.* at 2492. Chief Justice Roberts also mentions other provisions that would not make sense if tax credits were not available for Federal Exchanges. See *id.* at 2489–92. For a study detailing over fifty provisions of the ACA that would not make sense if Federal

Second, Chief Justice Roberts reads ambiguity into Section 36B by considering the purpose of the statute. He maintains that he only reads ambiguity into the provision by using context, but it is evident by the latter part of the opinion that he also utilizes purpose.⁷² Though he never explicitly states this, he hints at it: “But while the meaning of the phrase . . . may seem plain ‘when viewed in isolation,’ such a reading turns out to be ‘*untenable* in light of [the statute] as a whole.’”⁷³ His subsequent focus on the purpose of the statute to determine the true meaning of the provision suggests that purpose drove him to find the provision ambiguous in the first place.

After finding ambiguity in the statutory language, Chief Justice Roberts resolves that ambiguity by again looking to purpose. He writes, “Here, the statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”⁷⁴ No doubt, Congress’s reason for passing the ACA drives his interpretation of what Section 36B was supposed to originally say. Chief Justice Roberts ended his opinion with what seems like a confession:

[W]e must respect the role of the Legislature, and take care not to undo what it has done. *A fair reading of legislation demands a fair understanding of the legislative plan.*

Congress passed the [ACA] to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.⁷⁵

Exchanges did not receive tax credits, see Timothy Stoltzfus Jost & James Engstrand, *Anomalies in the Affordable Care Act that Arise from Reading the Phrase “Exchange Established by the State” Out of Context*, 23 U. MIAMI BUS. L. REV. 249, 260–66 (2015).

72 He proclaims, “In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.” *King*, 135 S. Ct. at 2495.

73 *Id.* (alteration in original) (emphasis added) (quoting *Dep’t of Revenue v. ACF Indus.*, 510 U.S. 332, 343 (1994)).

74 *Id.* at 2492–93 (citing *N.Y. State Dep’t of Social Servs. v. Dublino*, 413 U.S. 405, 419–20 (1973)).

75 *Id.* at 2496 (emphasis added). One commentator exclaimed that these were the most important words of the opinion, “sounding the death-knell . . . for the Scalian revolution in statutory interpretation.” Marty Lederman, *Textualism? Purposivism? The Chief Justice Comes Down on the Side of Interpretive Pragmatism*, SLATE (June 25, 2015, 4:26 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_john_roberts_ruling_in_king_v_burwell.html.

In short, Chief Justice Roberts utilized contextually constrained purposivism to determine the meaning of Section 36B. Though the text of the provision was plain, he found ambiguity in it by looking to context—the provisions surrounding Section 36B and the statute’s structure—as well as purpose. He then used the purpose of the statute again to ascertain the meaning of Section 36B. The main difference between contextually constrained purposivism and textually constrained purposivism is that the former approach disregards the plain meaning of the disputed provision if context and the purpose of the statute conflict with that plain meaning. A textually constrained purposivist judge, however, does not consider context or overall purpose if the meaning of the disputed provision is plain. Thus, contextually constrained purposivism is a novel, albeit hybrid, purposivist technique. It falls short of classical purposivism because text still plays an important role—judges first look to the text, not the statute’s overall purpose, to understand meaning. Interestingly, Chief Justice Roberts does not rely on the ACA’s legislative history to ascertain purpose, but that may be more because it was not readily available.⁷⁶ Under contextually constrained purposivism, it would not be surprising if the Court also looks to legislative history in order to better understand why Congress passed a statute. After all, legislative history is a rich source—and marque technique—for any purposivist.⁷⁷

II. THE IMPLICATIONS OF CONTEXTUALLY CONSTRAINED PURPOSIVISM

What are the implications of the Court’s new method of interpretation? Does it remain true to the Court’s role as Congress’s supposed agent? Or does it distort Congress’s true intentions, negatively impacting the democratic process? May it also invite too much judicial discretion, bringing to mind fears of justices imposing their own views into laws? This Part seeks to analyze these questions in depth, postulating the advantages and disadvantages of this new approach.

A. *The Positive Implications of Contextually Constrained Purposivism*

Contextually constrained purposivism appears to take the best elements from both purposivism and textually constrained purposivism: judges may consider both the purpose and the text to figure a provision’s

⁷⁶ See *King*, 135 S. Ct. at 2492.

⁷⁷ Looking to legislative history would seem to help the purposivist in finding Congress’s true intent in passing a certain provision. For an excellent discussion regarding the benefits of using legislative history, see generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992). But see Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–79 (offering a brief rebuttal regarding some of the concerns of using of legislative history).

meaning.⁷⁸ Even though purpose is the judge's most important consideration, the text still curtails a judge's analysis to a degree. As Professor Re explains, "On the up side, [contextually constrained purposivism] offers a way of preserving distinctly textual constraints on interpretation while also leaving analytical room to give in to the persuasive force of purposivism"⁷⁹ Even though text is an important consideration, a judge can deviate from it in special circumstances, like in *King*, to effectuate the true purpose of the statute.

Utilizing contextually constrained purposivism arguably allows the Court to be a more faithful agent of Congress. Under the approach, the Court takes into account the wider purpose of the statute, as opposed to the immediate meaning of a single provision. In this way, it may be that the Court respects the true intent of Congress and, consequently, the American structure of representative democracy. The Court in *King* believed that it most respected the will of the people when it tried to interpret Section 36B in light of the statute's overall purpose. Chief Justice Roberts highlighted the Court's facilitative role in the democratic process: "In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—to say what the law is.' . . . [W]e must respect the role of the Legislature, and take care not to undo what it has done."⁸⁰ The Court read Section 36B broadly in order to not undo what it believed the people wanted: more access to health insurance. Due to Congress passing statutes like the ACA that have headings indicating the explicit goal(s),⁸¹ it seems like contextually constrained purposivism is a germane way for finding the right meaning of a disputed provision.

Similarly, if the Court takes care to effectuate only Congress's will, there should be less risk of judges imposing their own subjective moral philosophies into the meaning of provisions. Congress's purpose is the guidepost (alongside considerations like text, context, legislative history, and more) that the Court follows when fulfilling its judicial function of "say[ing] what the law is."⁸² In theory, this additional guidepost should curtail judges' ability to impute their own moral values and beliefs into the text.

78 As Professor Re writes, "[Contextually constrained purposivism] strives to get the best of both worlds. It aims to adhere to clear text when it's the product of deliberate compromise, but not when it springs from an inattentive mistake." Re, *supra* note 10, at 418.

79 *Id.*

80 *King*, 135 S. Ct. at 2496 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

81 For instance, the first heading of the ACA is: "Quality, Affordable Health Care for All Americans." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119 (2010).

82 *Marbury*, 5 U.S. at 177.

Finally, by reading provisions in light of the statute's greater purpose, the Court is able to fix ambiguous or seemingly contradictory provisions to avoid absurd results.⁸³ The Court in *King* believed it was doing this. Had the Court read Section 36B narrowly and held that only State Exchanges merited tax credits, millions of Americans would have lost health insurance—an absurd result contradicting the statute's purpose of expanding access to health insurance.⁸⁴ Although it seems like the Court rewrote Section 36B to say, an Exchange established by the State *and Federal Government*,⁸⁵ the Court insisted it did no rewriting.⁸⁶ Instead, it was merely reading the provision that way in order to make it coherent with Congress's greater purpose.

B. *The Negative Implications of Contextually Constrained Purposivism*

While contextually constrained purposivism may appear to have many advantages, it is by no means flawless. First, the approach may actually invite too much judicial discretion. Judges can impose their own values and beliefs under the pretense that they are imposing the purpose of the statute.⁸⁷ Instead of purpose being a useful guidepost that constrains the Court's interpretation, its use can lead to manipulation. As Justice Scalia remarked in his dissent in *King*, "More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, *not by the unenacted will of our lawmakers*."⁸⁸ It is easier for a judge to impose his or her own will into a provision's reading under a purposivist approach rather than textualist. Any reviewer of a

83 For more on this idea, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that judges should interpret statutes dynamically—"that is, in light of their present societal, political, and legal context"). Professor Eskridge argues that judges are relational agents who should use their best efforts to carry out the *general* goals of the legislature. Since circumstances change over time, it is up to judge to keep the law updated for the legislature. *See id.* at 1480, 1544–45.

84 The Court wrote, "So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. . . . It is implausible that Congress meant the Act to operate in this manner." *King*, 135 S. Ct. at 2493–94 (citing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2674 (2012) (joint dissent)).

85 *See id.* at 2497 (Scalia, J., dissenting) ("Who would ever have dreamt that 'Exchange established by the State' means 'Exchange established by the State *or the Federal Government*'?"); *see also* 26 U.S.C. § 36B(b)(2)(A) (2012) (providing monthly premiums for qualified health plans "which were enrolled in through an Exchange *established by the State*." (emphasis added)).

86 *See King*, 135 S. Ct. at 2495–96.

87 As Professor Re notes, "On the down side, [contextually constrained purposivism] affords the Court even greater power and discretion . . . increas[ing] the risk of biased, insincere, and unexpected rulings." Re, *supra* note 10, at 418.

88 *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (emphasis added).

judge's textualist reading only needs to see the words of a statute to determine if the judge followed them. Justice Scalia wrote many disparaging remarks in his dissent in *King*, but none more critical than this: "And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."⁸⁹

The primary consideration in contextually constrained purposivism is Congress's purpose. Yet how are judges sure they know it? There are 535 members of Congress; each one might have a different reason for yelling "yea." As Professor Max Radin explained, "There are purposes and purposes."⁹⁰ In *King*, the Court reminded petitioners that the purpose of the ACA was to expand access to health insurance. After all, Title I of the ACA reads: "Quality, Affordable Health Care for All Americans."⁹¹ But, should every provision be read in light of this one purpose? Or might provisions reflect different purposes? At what level of generality should the Court frame the purpose? Petitioners made a plausible argument for the purpose of Section 36B: to compel the States to establish Exchanges, in order for their citizens to get tax credits.⁹² How is the Court so sure this is not the true purpose of Section 36B?

Another criticism is that the approach discourages judges from being faithful agents of Congress. Judges are not faithful when they impose their own will into statutes or miss the reason(s) the statute was passed. They also are not faithful when they look to extra-textual considerations to determine purpose. Justice Scalia argues that the Court in most circumstances should deduce purpose from text: "The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic

89 *Id.* at 2507. Due to the Court's "favoritism" of the ACA, Justice Scalia, now rather (in)famously, wrote: "We should start calling this law SCOTUScare." *Id.* If the Court did indeed play favorites with the ACA, was it not being candid when it read Section 36B broadly? Did it perhaps do so for political reasons? See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987) ("The scholar's obligation is to 'think, lucidly and openly,' about the issues; the judge must *act* in a manner sensitive to political and other realities and thus may opt for something less, or least different." (quoting GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 181 (1982))).

90 Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930) (explaining that "[w]e distinguish in our conduct and our thinking between immediate and ulterior purposes.").

91 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119 (2010).

92 See *King*, 135 S. Ct. at 2494. Justice Scalia agrees with petitioners. Establishing and running an Exchange is a costly process. If it were not for the tax credits, why would States elect to establish Exchanges in the first place? See *id.* at 2504 (Scalia, J., dissenting) ("A State would have much less reason to take on these burdens [i.e., establishing an Exchange] if its citizens could receive tax credits no matter who establishes its Exchange.").

circumstances.”⁹³ As Justice Scalia noted in another case, “[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.”⁹⁴ Judges violate Congress’s intent when they delve behind the words in the law. They instantly change the meaning by looking to any other source than the text. By “fixing” ambiguous or seemingly contradictory provisions, the Court is interfering with the provision Congress *meant* to pass. In this day and age, it takes great legislative compromise to decide on the passing of a statute—perhaps these poorly worded provisions are supposed to be that way.⁹⁵ When the Court “fixes” the meaning of such provisions, it hurts the democratic process.

When judges change the plain meaning of laws, they not only violate their roles as agents, they also violate the principle of separation of powers. An unhappy Justice Scalia criticized the Court for stepping into the Legislature’s boundary:

The Court’s decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people’s decision to give Congress “[a]ll legislative Powers” enumerated in the Constitution. They made Congress, not this Court, responsible for both making laws and mending them.⁹⁶

By usurping the Legislature’s role to make laws, the Court aggrandizes its own power. It rewrote the phrase “Established by the State” effectively seven times—that is how often the phrase appeared in the ACA.⁹⁷ The Court also encourages “congressional lassitude.”⁹⁸ The Court

93 *Id.* at 2503 (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819)). He reiterates that “[o]ur task is to apply the text, not to improve upon it.” *Id.* at 2505 (quoting *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989) (alteration in original)). Justice Scalia maintains that the Court is only allowed to improve the text when there is a “patently obvious” scrivener’s error: “Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake.” *Id.* at 2504–05. For one example of a court fixing a scrivener’s error, see *Cernauskas v. Fletcher*, 201 S.W.2d 999, 1000 (Ark. 1947), where the court read the words “in conflict herewith” into a statute that stated, “All laws and parts of laws . . . are hereby repealed.” The court explained: “No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words ‘in conflict herewith.’” *Id.*

94 *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (citing *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)).

95 See MANNING & STEPHENSON, *supra* note 4, at 54 (“[L]aws will be messy, uneven, and ill-fitting with their apparent purposes not because Congress is short-sighted or imprecise, but rather because legislation entails compromise, and compromise is untidy by nature.”).

96 *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (alteration in original) (citation omitted) (quoting U.S. CONST. art. I, § 1).

97 See *id.* at 2499.

98 *Id.* at 2506.

basically gave the drafters, who engaged in “inartful drafting,”⁹⁹ a get-out-of-jail-free card. What impetus does Congress now have to not continue writing legislation sloppily?

CONCLUSION

In *King*, Justice Scalia criticized the majority’s interpretive approach, exclaiming, “Today’s interpretation is not merely unnatural; it is unheard of.”¹⁰⁰ Justice Scalia’s critique is persuasive, because the Court employed an entirely new method of statutory interpretation: contextually constrained purposivism. This method has emerged in only the last few years, harkening back to a classical era of interpretation where the Court read statutes in light of their purpose. Nowhere is this approach more evident than in *King*, where the Court had to grapple with one of the most storied debates facing the judiciary: whether to interpret a provision according to its spirit, or letter. The Court, in the face of plainly worded text, decided to effectuate the spirit of the statute. This was to the dismay of textualists, none more so than Justice Scalia, but to the joy of millions who could now continue to afford health insurance.

The Court in *King* used contextually constrained purposivism to broadly interpret Section 36B. It looked to the context surrounding the provision to read ambiguity into it. By looking to other provisions that assumed tax credits were available on Federal Exchanges, the Court surmised that the provision did not make sense. What is more, the Court looked at the effects of interpreting the provision narrowly, finding it would be contrary to the ACA’s purpose for millions to lose their health insurance. Determining that the provision was open-ended, the Court then looked to the statute’s purpose to make sense of it. The Court’s actions were self-serving—after having just used purpose to initially find ambiguity, the Court would use purpose again to resolve it. In light of the ACA’s true purpose to expand access to health insurance, the Court held that the phrase “an Exchange established by the State” should have been written, for all intents and purposes: “an Exchange established by the State [and Federal Government].”

How the Court reached its holding has possibly great implications. For one, it suggests the Court believes it is acting as a faithful agent of Congress when it corrects inartful drafting in light of a statute’s purpose.

99 *Id.* at 2492 (majority opinion). Congress’s “inartful drafting” of the ACA brings to mind a description by Roger Traynor, Chief Justice of the Supreme Court of California, regarding the many statutes that came before his court: “Ordinarily what passes before judges on the reviewing stand is not a well-programmed, orderly parade, but fragments from a circus on the loose.” Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 2 (1977).

100 *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).

Text still plays an important, constraining role. Even though the Court disregarded the plain wording of Section 36B, it still looked to context to make sure that its new interpretation would be consistent with the ACA as a whole. Though this Case Comment takes no sides in whether the Court interpreted the provision correctly, the Court's interpretation does make sense if Congress's true goal was to expand access to health insurance.

Did the Court in *King* finally find a Holy Grail methodology for interpreting statutes? A foolproof method that can be used in any case under any circumstance? Probably not. When it comes to interpretation, perhaps there exist so many modes because the subject of interpretation, human language, is imprecise.¹⁰¹ Maybe this very human, very imperfect exercise called speaking is to blame for why there will never be just one method of interpretation. As John Locke once wrote long ago regarding interpretation: "[T]here is no end; comments beget comments, and explications make new matter for explications; and of limiting, distinguishing, varying the signification of . . . moral words there is no end. These ideas of men's making are, by men still having the same power, multiplied *in infinitum*."¹⁰²

101 This brings to mind Justice Oliver Wendell Holmes's wise observation regarding the very enterprise of law itself: "The danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

102 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 109 (Alexander Campbell Fraser ed., Dover Publ'ns, Inc. 1959) (1690).